Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Framework for Broadband Internet Service	)	GN Docket No. 10-127
	)	

REPLY COMMENTS OF MONTGOMERY COUNTY, MD.

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SUMMARY

The issues before the Commission are narrow ones.

The FCC asks, first, whether the Internet connectivity service offered to consumers at retail by wireline (or wireless) facilities-based providers may be reclassified as a Title II service. The comments filed support reclassification on a narrow basis, because the comments support a finding that such providers *offer* a transmission service to consumers that is a telecommunications service as defined in the Communications Act of 1934, as amended. Alternatively, the Commission has direct authority to enforce regulations similar to those stricken in the *Comcast* case based on Title II and Title VI, even if Internet connectivity is classified as an information service.

The Commission also asks whether it can adopt a "light touch" regulatory approach that protects consumers without interfering with the vitality of the Internet. Montgomery County believes that the answer to that question is also "yes," and that such a regulatory approach could be adopted consistent with a Title II regime.

Much of the debate in the comments properly revolves around the questions of whether regulation would interfere with the vitality of the Internet and deployment of broadband facilities, and whether regulation is necessary.

It is necessary. The status quo in the Internet is openness—a model in which content and applications can be easily added and accessed, and the network functions to transmit requested content and applications to and from consumers without discrimination. Consumers and our economy have benefitted enormously from this openness. But the Internet's openness is not an accident: the Commission has taken affirmative steps to protect it, and the record shows that these steps remain essential today. Several industry commenters have made it clear that in the

absence of regulation, the Internet's openness will quickly become a thing of the past. Entities that control the facilities that link consumers to the Internet may discriminate against content and applications that they do not own (or do not like), and may charge premium prices for certain applications, such as applications related to e-medicine. Those comments cannot be taken lightly by any government agency, including local governments like Montgomery County that are making heavy investments in information technology on the assumption that the public will be able to freely and easily access information, without the public (or the County as an information provider) paying premium tolls. The Commission needs to move now to protect the Internet.

Claims that regulation will necessarily stifle Internet development are not supported by the facts. Broadband deployment is due in significant part to government regulation, including local government regulations that required cable operators to provide high-capacity, bi-directional networks throughout their franchise areas. The Internet has flourished under a regulatory regime adopted by the Commission that established basic ground rules prohibiting facilities owners from discriminating against Internet traffic to favor their own economic interests, and under which the Commission clearly reserved the right to adopt additional regulations to protect Internet openness. The suggestion, then, that the mere possibility of regulation will harm the Internet seems disconnected from history. Rather, by affirming that Internet connectivity is subject to basic public interest principles, the Commission will provide guidance to the facilities owners, and also protect the application and content developers who have been the engines for the growth of the Internet and the information economy.

To be sure, any reclassification must be implemented carefully to avoid unintended consequences, including with respect to the ability of Internet service providers who are not ILECs or CLECs to obtain universal service funds. But it is possible for the Commission to prevent the harms, while actually encouraging broadband deployment through careful

reclassification. Moreover, by working cooperatively with state and local governments – rather than broadly preempting them, as some commenters suggest - the Commission will be able to ensure that consumers are protected, and broadband deployment encouraged.

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Montgomery County, Maryland (the "County"), herewith submits its reply to comments filed in response to the Notice of Inquiry ("NOI") issued by the Commission on June 17, 2010. At the heart of the proceeding is a basic question as to what steps the Commission should take to protect consumers and our economy, which for years have enjoyed the benefits of an open Internet. Consumers have expanded their home broadband usage with the expectation where those who controlled the facilities used to provide connections to the Internet would not control the content or applications provided via the Internet. The County urges the Commission to keep protection of an open Internet as its primary goal in this proceeding and others.

I. THE COMMENTS FILED PROVIDE GOOD REASON FOR THE FCC TO CONTINUE TO IMPOSE AT LEAST REGULATIONS OF THE SORT STRICKEN IN *COMCAST*.

The NOI has a narrow focus: the Commission asked whether the Internet connectivity service provided by wireline and wireless providers to the general public should be classified as a Title II common carrier service or as an information service. The Commission further asked whether it could protect consumers adequately through adoption of a "Third Way" that combined reclassification and forbearance to provide for limited regulation of wireline (and possibly wireless) providers offering Internet connectivity to the public.

A. The Record Is Sufficient to Support a Decision To Reclassify.

The comments filed in this proceeding would support a conclusion that Internet connectivity service provided by a wireline provider may be classified as a Title II common carrier service. As Montgomery County explained in its initial comments, there are alternative grounds upon which the Commission may reinstate regulations similar to those stricken in *Comcast* based upon Title I and Title VI, regardless of the classification of the service.

There appears to be no substantial question as to the controlling legal standard for determining whether Internet connectivity service is a common carrier service. A service may be classified as a common carrier service either if there is a

> legal compulsion ... to serve [the public] indifferently [or if] there are reasons, implicit in the nature of ... [the] operations to expect an indifferent holding out to the eligible user public."

In re Cable & Wireless, Plc, 12 FCC Rcd. 8516 (1997), citing test enunciated in *Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) ("NARUC I"); *see also Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) ("NARUC II").

Even setting aside the first prong of the *NARUC I* test, Montgomery County, Public Knowledge, Free Press, and others have cited ample evidence that wireline providers offering Internet connectivity to end users do make an "indifferent holding out to the eligible user public." These providers offer a user an ability to download and upload information of the user's choosing, to and from sites of the user's choosing. While commenters opposing reclassification argue that providing this service inherently involves computer processing and hence information services, *see e.g., Comcast Comments* at 18, any "integral" processing appears to be essential to establishing the connection to the Internet and maintaining the integrity of the network. By definition, such processing does not change the character of the service, much less transform it

from a telecommunications service to an information service. 47 U.S.C. § 153(20). The comments merely confirm that the Internet functions as an "end-to-end" network: a series of interconnected computers that receive and transmit bits of information without regard for its content and with its intelligence (where the information is created, interpreted, and used) located primarily at its edges, where the users are.[1] The fact that companies offering this service "add-on" other services (like antivirus protection) does not alter the fact that the companies are undertaking to provide a transmission service indifferently to the public. Certainly, the record here appears sufficient to support a "reclassification" of the Internet connectivity service as provided to the general public by wireline facilities-based providers as a telecommunications service, based upon the way it has been offered.[2]

Perhaps recognizing (despite hearty protestations to the contrary) that the Commission has a basis for reclassification, many of the comments opposing reclassification do so on the ground that it is bad policy and unnecessary to protect consumers. Those comments are based on critical misstatements of fact. Moreover, the record shows that there is ample reason for the Commission to ensure that a base level of regulations are in place immediately to protect the public interest.

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[1] *See* Mark A. Lemley & Lawrence Lessig, *The End of End-To-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. Rev. 925 (2001).

[2] Montgomery County has not reviewed the record with respect to the nature of the offerings made by wireless providers, *or* non-facilities based providers under the second prong of *NARUC*. As *NARUC* suggests, common carrier determinations are generally made on a "case by case" basis, and while this certainly does not prevent the Commission from classifying the service offered by particular classes or groups of users as common carrier service, it does suggest that the Commission is not compelled to assume that the offerings by facilities and non-facilities based providers must be classified similarly.

B. There Is No Reason To Suppose That Reclassification Will Deter Broadband Deployment or Result in Overregulation.

1. ***Broadband Has Been Subject to Regulation—and It Has Flourished.*** Several commenters[3] contend that reclassification will necessarily stifle Internet growth, and argue that the deployment of broadband facilities and the growth in the Internet is due primarily to the fact that Internet services have been deregulated.

A careful review of the facts – including facts presented in connection with the development of the National Broadband Plan – indicates the contrary. ***The Internet has flourished precisely because cable and telephone networks have been regulated.*** The spread of cable modem service provides an excellent example. In 1984, Congress recognized that as a condition of granting a cable franchise, a local government may require a cable operator to "buildout" its cable system within the local community, and to ensure that the system has sufficient capacity to meet the cable-related needs and interests of the community. Many local governments proceeded to adopt and enforce buildout requirements in cable franchise agreements, and to require construction of high-capacity communications systems. The requirements compelled the cable operator to serve areas in the community that the cable operator—if left unregulated—might not otherwise serve.

When the franchised cable operators expanded their systems to allow subscribers to use cable modem service, these buildout requirements proved critical. Many Americans had access to cable modem service at their homes precisely because the cable operator was subject to regulation, and had a broad communications pipe in place. Today, the cable industry points to the number of Americans passed by cable broadband networks —a number that would be much smaller if the networks on which the Internet runs had been truly "unregulated."

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[3] *See, e.g.*, Comments of National Cable & Telecommunications Association ("NCTA Comments"); Comments of Telecommunications Industry Association.

If broad deregulation were the key to deployment, one would have expected to see broadband deployment increase dramatically in 2005-2010 in states that abandoned local franchising and eliminated buildout requirements. That did not happen. A study by Dr. Constance Book presented in the National Broadband Plan proceeding shows that virtually no new additional deployment has occurred in North Carolina, one state that switched to a state franchising model. Dr. Book observed that in the first state that adopted statewide regulation, Texas, independent researchers using zip code analysis and the 2000 census data found that new entry in Texas was only in wealthier neighborhoods with high home values and lower minority populations. These are obviously not the neighborhoods that suffer from the absence of broadband. Thus, there is little convincing support for the notion that deregulation is essential to, and will stimulate widespread new broadband deployment.[4]

Moreover, the Commission has consistently strived to maintain an open Internet through its own regulations. Until the court struck down its regulations in the *Comcast* decision, the FCC had established and was enforcing requirements designed to ensure that consumers could use Internet access service to send and receive information of their choosing without interference.[5] The predicate for reclassification was the Commission's assumption that it could regulate Internet connectivity to maintain an open Internet even if Internet access services were classified as information services.[6] Hence the notion that the expansion of broadband from 2000-2010 was

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[4] *A National Broadband Plan for Our Future*, GN Docket No. 09-51, *Reply Comments of NATOA et al.* (filed January 27, 2010). Dr. Book's study is included as Attachment A to these comments.

[5] In addition to its general guidelines, the Commission imposed specific conditions on mergers to maintain Internet openness. *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, 16 FCC Rcd. 6547, FCC 01-12, CS Docket No. 00-30, at ¶ 126 (2001).*

[6] *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14853 (2005)("Wireline Broadband Order")(concurring statement of Commission Michael J. Copps).

a function of deregulation is belied by the fact that regulations were in place, and the expansion occurred in the face of FCC statements that it would act to protect the Internet. If anything, the evidence thus suggests that the Internet can and does flourish under a regulatory regime that maintains its openness.

The problem here is that the FCC is being told quite bluntly by some commenters that under a Title I approach, it will have a "hard time" developing the requisite record to maintain the sort of regulations struck down in *Comcast*. *Comcast Comments* at n. 72.

2. ***The Effect of Reclassification Can Be Limited***. Likewise, several commenters suggest that reclassification will have a necessarily broad effect. That is not the case as long as the Commission keeps its sights narrowly focused on the question it raised: whether the provision of Internet connectivity service to retail customers by wireline (or wireless) providers is a common carrier service. The Commission is not required to reach other issues, including whether other similar services are, or should be, treated as a common carrier services.

The comments, for example, generally do not appear to address whether data transport service to the Internet is being offered on a common carrier basis by middle mile carriers, or by municipally-owned networks that may provide Internet services to schools or libraries. *In Re Fed.-State Joint Bd. on Universal Serv.*, 16 FCC Rcd. 571 (2000). The Commission does not need to decide those questions. In this respect, the Commission's decision in the *Wireline Broadband Order* to allow carriers to offer Internet access service as a separate telecommunications service is instructive. The Commission was necessarily concluding that it was *possible* that Internet service could be offered on a common carrier basis by some, even if other entities offered the service on a non-common carrier basis. In the *Wireline Broadband Order,* of course, the Commission was addressing entities that made a decision to self-classify as common carriers; but under relevant law, discussed above, an entity can become a common

carrier through actions it takes in the regulatory arena *or* in the marketplace, by offering services indifferently. A decision narrowly focused on the providers of Internet connectivity to consumers need affect no one else.

3. ***Title II Classification Will Not Weigh Down the Internet*** Finally, commenters argue that reclassification must be avoided because: (a) Title II regulation will necessarily be weighty; and (b) even if it is not, it *might* be weighty; and (c) the Commission may not be able to forbear or may lack the authority to forbear in this proceeding. These concerns miss the mark.

While many of the comments focus on forbearance, it is important to note that the Commission has broad authority under Section 201(b) to prescribe such regulations as may be necessary to carry out the provisions of Title II. Although the authority to make regulations (absent forbearance) does not carry with it the authority to completely deregulate a service, Section 201(b) does provide the Commission ample authority to determine how Title II will be implemented with respect to Internet connectivity services in light of the other goals of the Act (as expressed, for example, in Section 706). The Commission has already decided that the regulations stricken in *Comcast* were necessary and in the public interest. Given that finding and the D.C. Circuit's *Comcast* decision (which commenters concede found only that the sections cited by the Commission in defense of the regulations did not give rise to ancillary authority), the Commission should have no difficulty immediately applying at least the *Comcast* requirements to Title II Internet connectivity services. The FCC may also be in a position to decide at least for now, that these or similar requirements, coupled with continuing oversight are sufficient—and that further changes and/or forbearance can be addressed later. Light-touch regulation *can* be implemented in this proceeding, without foreclosing the possibility of future regulation or deregulation as the public interest requires.

C. The Record Shows the Commission Must Act To Protect the Internet Now.

The comments show why some immediate action is necessary. Several commenters suggest that no regulation is necessary, because (they claim) wireline and wireless providers have not abused their control over facilities to favor or disfavor applications or content provided via the Internet. Setting aside the merits of that claim, the providers have been operating under a regime where the FCC claimed the authority to prevent abuses. But the commenters also make it clear that *absent regulations,* a very different Internet may quickly appear. NCTA states that cable operators have a right to discriminate among "content and application providers" based on "their different ability to pay for enhancements to their transmission, their different value, and their attractiveness to consumers." NCTA Comments at 33. NCTA further claims that operators have the right to treat "content and application providers differently" in order to maximize "revenues and return on investment." *Id.* at 34. Under this view, once Comcast merges with NBC-Universal, it would be free to give preferential treatment to traffic to and from Hulu, and to ensure that Hulu's content is easier to access and that subscribers can more easily interact with it than content on YouTube. Bandwidth limits and fees could apply when accessing the latter, but not the former. A provider could quite literally create special tolls for applications critical to e-medicine or public safety in order to increase profits. The impact on public safety and on the burgeoning Health IT market could be enormous. What is more, NCTA argues that the absence of regulation creates a reliance interest that entitles providers to compensation if regulations change. *Id.* at 35.[7]

[7] While NCTA tried to do so, it cannot plausibly assert that any cable operator or telephone company has a reliance interest at this point. After all, the Commission *has been asserting the authority* to impose Title II-like obligations under its Title I ancillary authority. However, NCTA's argument very clearly shows the risk of deregulating.

While the First Amendment and Fifth Amendment aspects of NCTA's arguments lack merit,[8] the comments very clearly identify the risks of failing to act. Presumably NCTA is not raising whimsical hypotheticals – it is describing the business arrangements into which its members may enter if permitted to do so.[9] In the absence of strong Commission action, the Internet and its myriad commercial and non-commercial uses are at risk. The impact on the content and application community – which would suddenly be facing a regime where those who have deals with facilities owners may prosper, and those that do not may perish – would be stunning.

Indeed, the NCTA comments suggest that it is very important for the Commission to make sure continued regulation rests on the strongest possible foundations, as Montgomery County suggested in its initial comments. The Commission may do this by finding that even if Internet connectivity is an information service, the Commission has authority to impose the conditions of the sort stricken in *Comcast* under Title VI and Title II. *See, Comments of Montgomery County, Maryland* at 8-24.[10]

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[8] Cable operators and telephone companies that undertake common carrier activities are not engaged in speech – they are engaged in the transmission of a signal, and by definition are not acting as editors. It is not a taking to reasonably regulate property that has been dedicated by fact or law to a common carrier service, *FCC v. Florida Power Corp.* 480 U.S. 245, 253 (1987) nor is it an interference with free speech to require a common carrier to satisfy its carriage obligations. Moreover, courts have consistently recognized that cable operators obtain substantial benefits from both the federal government (in the form of CARS and other licenses) and from local governments (in return for the right to use and occupy public property), and that in return for those benefits, operators can be required to satisfy certain public obligations, even where those obligations impinge in some respects on speech-related interests. *Chi. Cable Commc'ns v. Chi. Cable Comm'n*, 879 F. 2d 1540, 1551 (7th Cir. 1989).

[9] Oddly enough, what NCTA describes is not Internet connectivity service as now advertised - where the user controls the content, and it is tailored to the user's desires, but a clear cable service: access to information selected by the owner of the facility for distribution to its subscribers.

[10] As suggested above, and as further discussed by Montgomery County in its initial comments, telephone companies provide Internet service via facilities that are claimed to be common carrier facilities. Under *NCTA*, the Commission has ample authority to direct that Internet access

II. THE COMMISSION SHOULD IMPLEMENT ANY RECLASSIFICATION CAUTIOUSLY.

A. The Commission Needs To Ensure Universal Service Moves Forward on A Sound Footing.

Montgomery County public schools and libraries, like schools and libraries in thousands of other jurisdictions, are beneficiaries of the E-rate program. The County would be very concerned with any action by the Commission in this docket that would put the E-rate at risk. A decision to reclassify by simply declaring that Internet access service is a telecommunications service could harm both E-rate beneficiaries and non-telecommunications providers, if improperly implemented, as explained below. Nevertheless, the County believes that reclassification need not result in harm if the Commission simply clarifies its current rules and narrowly defines the scope of any reclassification.

Regulating Internet access under a theory based on Title I and ancillary jurisdiction, instead of reclassifying, probably would not directly harm the E-rate *status quo*. But the Commission and most commenters recognize that national broadband goals would be better served if the existing universal service regime encouraged the deployment of broadband facilities and services. Absent reclassification, however, it is far from clear that the Commission can rely on Section 254 to justify expansion of broadband deployment as NCTA and AT&T have

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provided via common carrier facilities be provided on a common carrier basis – and therefore should have the authority to declare that provision on any other basis must satisfy regulations imposed by the Commission. With respect to cable systems, the issue may be slightly different. Cable systems are typically constructed pursuant to Title VI; cable operators typically lease capacity to subsidiaries that provide telephone service, and the subsidiary, but not the system owner, is the registered CLEC. Cable operators may therefore argue that the system itself is not a common carrier facility, and that the Commission cannot compel the operator to provide common carrier services via that facility. Regardless of the merits of that argument, the Commission can recognize, as Montgomery County pointed out in its initial comments, that under Title VI, the FCC has broad authority to set "operational" standards for cable systems – and thus to prevent the use of those systems to control Internet traffic.

argued.[11] Indeed, the Commission should resist being lured down the garden path with the promise that ancillary jurisdiction can sustain universal broadband service.

1. The Commission Should Avoid Harming E-Rate Beneficiaries.

Under the E-Rate rules, schools and libraries are currently eligible for discounts on three categories of services: telecommunications service, Internet access, and internal connections.[12] The first category can only be provided by telecommunications carriers, but any type of entity can provide Internet access and internal connections.[13] In addition, pursuant to Section 254(d), under the current rules only providers of telecommunications services can be required to contribute to the universal service fund.[14]

Reclassifying Internet access broadly as a telecommunications service, without clarification, could have at least two harmful effects. First, non-telecommunications providers would presumably no longer be able to provide Internet access; at the very least, there would be ambiguity in the Commission's rules, since 47 C.F.R. §54.517 would still say non-carriers could provide Internet access, but 47 C.F.R. § 54.502, which effectively limits support for telecommunications services to telecommunications carriers, would suggest that they cannot.

Second, entities that currently provide Internet access but are not required to contribute to the universal service fund could find themselves liable for contributions. The County is concerned that this could harm government-owned networks that provide Internet access even if it is only to other government entities, particularly if some form of compensation is involved. Presumably this issue would be addressed in general in the high cost proceeding, *In Re High-Cost Universal Service Support*, WC Docket No. 05-337, but it is not clear that the potential effects of reclassification on state or municipally-owned networks would be addressed there. In

[11] NCTA Comments at 38-42; AT&T Comments at 22-27.
[12] 47 C.F.R. §§ 54.502, 54.503.
[13] 47 C.F.R. §§ 54.517.
[14] 47 C.F.R. § 54.706(a).

any event, the potential impact on universal service providers is another reason why any reclassification should proceed narrowly; why the Commission does need to make it clear that entities that now provide Internet Access Service can continue to do so; and why the Commission needs to find explicitly that contribution issues should be addressed separately.

2. Arguments that Under Section 254, the Commission Can Fund Extension of a Broadband Information Service to the Home Stretch the Statute – and the Commission's Authority – to the Limit; the Commission Would Be Wise Not To Assume That Universal Service Can Be Easily Reformed If Internet Access Service Provided To the Home Is a Title I Service.

NCTA argues that, notwithstanding the repeated references to "telecommunications services" throughout Section 254, the Commission has the authority to ignore that limitation and extend the statute to encompass broadband services.[15] NCTA also claims that the one provision of the statute that clearly evinces a congressional intention to extend information services to a particular class, Section 254(h), can be read to allow expansion of the E-rate program for schools and libraries to include broadband services to students at home.[16]

To begin, NCTA goes too far when it suggests that the Commission's current universal service regime is based on Title I or ancillary jurisdiction.[17] The Fifth Circuit's decision in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 440-443 (5th Cir. 1999), upholding the current rules, is fundamentally and almost entirely a *Chevron* statutory interpretation case and not an ancillary jurisdiction case. The court found authority under Section 4(i) to uphold payments to non-telecommunications carriers under the E-rate provisions, but that is the only aspect of the case that touches on ancillary jurisdiction. *See id.* at 443. Furthermore, whatever might be said about the Commission's universal service regime prior to the adoption of the

[15] NCTA Comments at 38-40.
[16] NCTA Comments at 40-42.
[17] NCTA Comments at 39, 42.

Telecommunications Act of 1996, the fact is that the Commission is now bound by the terms of Section 254.

Indeed, precisely because the Commission is bound by Section 254, any attempt to use the universal service regime to promote broadband deployment must be based on the language of the statute. Section 254 directs the Commission to take certain steps to provide certain classes of persons with access to telecommunications services, and to provide certain other classes of persons with access to information services. This does not mean that the Commission can grant access to information service to all persons, or even to additional classes of persons. In fact, the current E-rate program may represent the outer edges of the Commission's jurisdiction. The Fifth Circuit upheld the E-rate only reluctantly,[18] and to argue as NCTA does, that the Commission could rely on its ancillary authority to extend broadband to any household that might be occupied by a K-12 student, may stretch the rationale of the E-rate to the breaking point.

NCTA's first theory is based on Sections 254(b) and (c). The company essentially argues that, because Section 254(b) "directs" the Commission to promote access to information services, the Commission can rely on its ancillary jurisdiction to broaden Section 254(c)'s definition of universal service – "an evolving level of telecommunications services that the Commission shall establish periodically" – to include broadband within the scope of the high cost universal service program. This theory has two weaknesses. First, Section 254(b) is not a directive, but merely a statement of general principles. It is true that Congress stated a policy

[18] The discussion of the E-rate in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 440-443 (5th Cir. 1999) makes it very plain that the court disagreed with the Commission's reading of the statute. The court deferred because it had to under *Chevron*, but the court stated three times in its discussion that it disagreed with the agency's interpretation, *id*. at 440, 441, 442, going so far as to say that "[t]he best reading of the relevant statutory language nonetheless indicates that the FCC exceeded its authority by mandating discounts for internet access and internal connections."

favoring making information services more widely available, but it gave express guidance on how to do that in the remainder of the statute. In particular, Section 254(c) refers expressly to universal service as consisting unambiguously of telecommunications services, with only one exception: Section 254(c)(3) (Special Services). As noted earlier, that provision allows the Commission to designate additional services for schools, libraries, and health care providers for the purposes of subsection (h). Section 254(h) in turn refers to information services, after making a distinction between telecommunications services and advanced services, which include information services. In other words, under the statutory scheme, Congress defined universal service as consisting of designated telecommunications services, plus information services for schools and libraries.

NCTA's second theory turns on Section 254(h), the one provision of the statute that contains a clear directive to promote access to information services. But, NCTA's arguments ignore the context in which Section 254(h) refers to information services. Section 254 does not direct the Commission to adopt rules to promote broadband for all, or even to support education, or to improve the educational opportunities of students. The only general reference to "education" in Section 254 appears in Section 254(c)(1)(A), which directs the Commission to consider the extent to which telecommunications services included within the definition of universal service are "essential to education, public health, or public safety." Indeed, this language undercuts NCTA's position because, in the absence of reclassification, the Commission's authority under Section 254(c)(1)(A) is limited to telecommunications services. To claim that this specific reference could be broadened to include non-telecommunications service is particularly suspect because the statute specifically provides for the provision of other types of services (using the terms "special services," "advanced services," and "information services") only to schools and libraries. Indeed, every reference in Section 254 that is relevant to

the provision of broadband service in an educational setting speaks specifically of schools and libraries. Those references occur in four places:

1. Section 254(b)(6) states: "Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h)."

2. Section 254(c)(3) states: "In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanism for school, libraries, and health care providers for the purposes of subsection (h)."

3. Section 254(h)(1)(B) states: "All telecommunications carriers serving a geographic area shall . . . provide [services designated as part of universal service] to elementary schools, secondary schools, and libraries for educational purposes . . . ."

4. Section 254(h)(B)(2)(A) requires the Commission to adopt rules "to enhance . . . access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries . . . ."

To put it in the terms of the *Comcast* case, it is by no means certain that an expansion of the universal service program to deliver broadband services and facilities beyond schools and libraries would be "reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[19] Any such regulation grounded in ancillary authority will be vulnerable to an attack on this ground. It might be upheld – but it would be vulnerable; the Commission should not gamble with policy decisions of such weight.

[19] *Comcast v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010).

AT&T makes two arguments[20] both of which suffer from similar flaws.[21] Indeed, AT&T's first argument is fundamentally the same as NCTA's claim that Sections 254(b) and (c) give the Commission ample authority to include broadband services within the scope of universal service.

Furthermore, like NCTA, AT&T ignores the obvious hostility of the Fifth Circuit towards the Commission's inclusion of Internet access in the E-rate program. Trying to read Internet access into Section 254(c)(1) would have fared no better, at least before the Fifth Circuit panel. On the other hand, if Internet access as provided by wireless or wireline providers to the general public were to be deemed a telecommunications service,[22] the objections to inclusion of the service in the program would vanish. Thus, the Commission would be better able to apply AT&T's theory and advance the goal of using universal service mechanisms to promote broadband ***after*** reclassification.

AT&T's second theory, based on Section 706(b) of the 1996 Act, is actually just a variant of its 254 theory. AT&T correctly observes that Section 706(b) directs the Commission to "take immediate action" to accelerate deployment of "advanced telecommunications capability" – which includes "broadband telecommunications capability" – under certain circumstances. But that does not mean that the universal service program can be enlisted in that cause. Section 706(b) may give the Commission certain authority related to broadband deployment. But universal service is a specific set of mechanisms that must meet the parameters of Section 254.

[20] AT&T Comments at 22-27.
[21] Time Warner puts forward essentially the same theories. Time Warner Comments at 79 – 82.
[22] Of course, AT&T's objections would also fall as to other providers of Internet connectivity that choose to offer services on a common carrier basis, even if those providers do not fall within the scope of any final order in this proceeding.

Section 706(b) does not grant the Commission the authority to rewrite Section 254, and Section 706(b) adds nothing to the Commission's powers under Section 254.[23]

B. The Commission Need Not Broadly Preempt State or Local Regulation.

Several commenters argue that reclassification will result in a broad new effort by states and localities to regulate the Internet, and that the Commission must therefore act to immediately preempt state and local authority over broadband facilities and services. There are three reasons why the Commission need not preempt now.

First, there is no real risk of such precipitous action. As the Commission recognized in the *NOI*, classifying Internet connectivity as a Title II service, if anything, *strengthens* the ability of the Commission to preempt state and local actions that unduly interfere with federal law.

Second, there are areas where the Commission *cannot* preempt. States and localities have a strong and independent interest in controlling facilities in the rights-of-way and on public property. The FCC cannot, for example, preempt local authority to franchise, or to obtain compensation for placement of facilities in the rights-of-way. *City of Dallas v. FCC*, 165 F.3d

[23] This is not to say that the universal services statute should be read narrowly. Montgomery County and NATOA have argued for an expansive reading of the universal service statutes in other dockets, to support the funding of facilities rather than only services. *See, e.g.*, *School & Libraries Universal Service Support Mechanisms*, CC Docket No. 02-6, *Comments of NATOA, et al.* (filed July 9, 2010); *Schools & Libraries Universal Service Support Mechanisms*, CC Docket No. 02-6, *Reply Comments of Montgomery County, Maryland* (filed July 26, 2010). Such an interpretation would require the Commission to alter the rationale on which it based the E-rate, and rely more directly on the reference to enhancing "access to advanced telecommunications and information services" in Section 254(h)(2)(A). But that reading is based firmly in the statutory language, and the County's proposal calls for funding of facilities that would directly serve schools and libraries, not the subsidization of services to vast numbers of individual households. Furthermore, it is actually consistent with the Joint Board's original rationale for extending support for material connections. *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9016-9017 (1997); *Federal-State Joint Board on Universal Service*, Recommended Decision, 12 FCC Rcd 87, 330-333 (1996). The NCTA and AT&T arguments do not appear to have the same sound footing.

341, (5th Cir. 1999); *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 98 (1893).[24] Moreover, it would be unwise to do so. Imposition of conditions and obligations upon cable operators and telephone companies is in part justified in return for their use of rights-of-way and other public property, as explained in n.8, *supra*.

Third, as Montgomery County explained in its initial comments, local and state governments may be in a position to assist the FCC in the implementation of its broadband plans and associated regulations. The goal here should be constructive cooperation, not preemption.

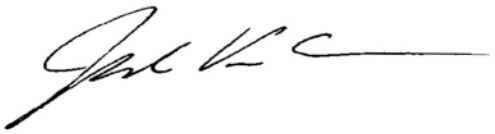
III. WHILE THE COMMISSION'S AUTHORITY IS NOT AS CIRCUMSCRIBED AS SOME COMMENTERS SUGGEST, THERE IS AMPLE REASON NOT TO RELY ON TITLE I.

In an intriguing back and forth, entities that oppose reclassification argue that notwithstanding *Comcast*, the Commission has ample authority to protect the Internet, while those who support reclassification argue that the Commission can accomplish virtually nothing. As suggested in Part II.A, the claims of those who oppose reclassification are much exaggerated. Likewise, Montgomery County disagrees with some of the comments filed by supporters of reclassification with respect to the FCC's authority, such as Free Press' suggestion that the Commission cannot protect public safety interests through its control of spectrum and under its ancillary authority related to that control. It should follow that if spectrum should only be licensed in the public interest, any use of that spectrum – including broadband usage – must be subordinate to public safety concerns.

[24] Some commenters go so far as to ask the Commission to preempt local taxation of the Internet connectivity services - the fear being that if Internet connectivity is reclassified, it will be subject to unlimited taxation. It should be obvious that taxing authority does not depend on the classification of the service under the Communications Act, so the comments are simply a request for preemption, unrelated to the issues in the NOI. In any case, the concerns are exaggerated in light of the Internet Tax Freedom Act, which defines what taxes are and are not permitted. The Commission obviously has no authority to alter the balance struck by Congress in the Internet Tax Freedom Act, and in fact is expressly prohibited from preempting state and local taxes. Telecommunications Act of 1996, Section 601(c).

Having said that, what Free Press, Public Knowledge and others point out – indeed, what all commenters concede – is that each regulation adopted pursuant to Title I ancillary jurisdiction would face independent and extended challenges. To the extent all commenters also agree that certainty will encourage deployment better than uncertainty, a regime where the legal basis and applicability of rules is subject to question is about as uncertain as it gets. Regulation should be grounded directly in Title II and can also be grounded in Title VI, as Montgomery County has explained.

Respectfully submitted,



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EFFECTS OF REDUCING LOCAL CONTROL ON

THE AVAILABILITY AND AFFORDABILTY OF BROADBAND

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About the Author

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I. SUMMARY OF REPORT

I was asked to examine the question of whether one is likely to increase the availability or adoption of broadband by limiting the compensation/public benefits that local governments may obtain from entities that place facilities in the rights-of-way to provide particular services, or by regulating local management of public property. Based on my work, I conclude that such a course is actually not likely to lead to increased broadband deployment, but instead evidence finds it is highly likely to result in an increasing digital divide. One can turn to recent preemption of local oversight in video franchising around the United States for evidence of these end results.

II. THE EFFECT OF STATE LAWS LIMITING LOCAL CONTROL OVER COMMUNICATIONS SYSTEMS

Amid a flurry of lobbying between 2005 and 2007, telephone and cable companies asserted that local regulation was a barrier to increased competition in offering competitive multichannel services. Several researchers, including myself, have now examined the effect of removing local control and reducing costs of entry, and have discovered that the approach adopted by the states does not appear to significantly increase competition or reduce rates, and has had significant, adverse effects, increasing the gap between the information rich and poor, for example, and by (in many cases) leaving communities without necessary funding or facilities to support institutional networks or public, educational and government channels.

The first state to remove the local franchising process was Texas in 2005. A study using zip code analysis and the 2000 census found that the activity of new marketplace entrants in Texas following passage of the law was only in wealthier neighborhoods with high home values and lower minority populations. These neighborhoods benefit from competition, not the establishment of new service and extension of broadband or cable services to new areas of the

state.[1] Roughly one year after local oversight was eliminated, Verizon had launched FiOS in 13 communities in Texas. According to census data, households in these communities:

- Earned almost twice as much in annual income as the average Texan.
- Were 70% as likely to be White non-Hispanic
- Had home values that are more than double that of the average Texas home
- Had virtually non-existent poverty levels (500% lower than the State of Texas)
- Were twice as likely to have earned a college degree

The Texas Public Utilities Commission in January 2010 released their own inquiry using the same variables and as part of their overarching effort to monitor the impact of the newly deregulated marketplace.[2] The PUC also found evidence of the practice of redlining. The PUC writes,

"The Commission's study indicates that there are patterns of deployment of cable and video facilities by some companies in various areas in which rates of deployment of facilities positively correlate with household income or home value or negatively with the percentage of minorities in the area." (PUC study, p. 5).

Another example of removal of barriers in promises of the roll-out of more services like high-speed broadband is in the state of North Carolina. On July 20th, 2006, North Carolina adopted a state franchising law that established sunsets to local cable franchises and all public benefits negotiated with those agreements. The new state law raised telecommunications taxes and effectively removed the responsibility of the service provider to provide financial support for public, education and government channels; those channels must now be supported out of general fund revenues received from all citizens, without regard to whether the taxpayer subscribes to cable and can receive the PEG channels. Other negotiated local public benefits were also eliminated under the new law. In the City of Greensboro, the local government had negotiated an institutional network that provided broadband to all city government buildings and local schools passed by the cable system. This public benefit of the local franchise was

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[1] Book, C. and Meyers, S. (2007). Simple Questions--Complex Answers: An Analysis of the Impact of SB5 on Texans. Presented to the National Association of Telecommunications Officers on April 1, 2007.

[2] Report to the Texas Legislature and Sunset Advisory Commission (December, 2009). Cable Service and Video Service Provider Study. Available online at www.puc.state.tx.us/cable/projects/37172/2009_Cable_Service_Study.pdf.

valued at millions of dollars annually. That public benefit now lost under the new state law, shifted to a payable service by the City of Greensboro and every local taxpayer.[3]

More unfortunate for local governments and the citizens they serve in North Carolina is that under this new state model, there has been NO significant entry by AT&T (or any other service provider) who during the passage of the legislation testified that they would bring local competition would reduce communications service costs for every North Carolinian.

Elimination of local oversight is having the same result around the country. Wisconsin found that the elimination of local oversight did result in new competition for a number of state residents, but since the state's law passed rates had climbed 28% rather than saving customers up to $129 dollars a year as was promised during lobbying for the bill.[4]

A more compelling study was recently conducted by the University of Michigan.[5] In an effort to understand if the reduction of perceived barriers to entry in 2007 had led to increased competition, better rates and more services, a comparative analysis of Michigan to Texas and California was conducted. Researchers did not find evidence of more availability of services, or a number of new entrants in the marketplace and certainly not a reduction in prices. In fact, Michigan saw a 22% increase in real costs for video services and only one new provider had entered the market. California saw a sweeping increase of 69% in real costs when corrected for inflation.

Other studies also indicate that elimination of local control does not result in more competition of greater deployment. A recent study by Dr. Alan Pearce as part of a suit brought against the City of Portland by Time Warner Telecom presented evidence that management and policies related to use of the public ROW did not create barriers to entry. Pearce testified that based on data collected in communities of similar size to Portland that the fees charged for access to rights-of-way did not reduce competition. In fact, Portland was home to a competitive telecommunications environment that allowed users of communications services to effectively switch from one provider to another, a key indicator of market health. Pearce also concluded

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[3] An Act to Promote Consumer Choice in Video Service Providers and to Establish Uniform Taxes for Video Programming Services. General Assembly of North Carolina. NC 2006-151.

[4] Stein, Jason (October 24, 2009). Price promises of backers of cable bill fall flat. Wisconsin State Journal. Retrieved from http://host.madison.com/wsj/news/local/govt_and_politics.

[5] Report of the Center for Science Technology & Public Policy. University of Michigan. Statewide Video Franchising Legislation: A comparative study of outcomes in Texas, California and Michigan. Released March 2009.

that the City's active right-of-way management in itself created an environment which permitted equitable entry into the marketplace and that the public benefits negotiated in the agreements permitting entry were long-standing, and reflected an appropriate balancing of competitive interests and taxpayer interests.[6]

Entry costs caused by local control of rights-of-way or local conditions on entry (such as reasonable build-out requirements and compensation requirements) are not significant factors deterring competition and build-out. In the absence of some control, companies appear to invest money where profits are highest, rather than expand service to under-served areas.

II. IMPACTS OF LOCAL CONTROL

In fact, the local regulation of one type of communcations system - cable television systems - has resulted in increased broadband deployment around the country. With local governments providing the primary cable television oversight in the United States, cable television was invented, launched and today is a $115 billion dollar industry with more than 1200 companies, operating almost 8,000 cable systems, **providing 92% of American homes with broadband availability** and franchise fee payments to local governments of $3 billion dollars.[7] The sometimes difficult negotiations to establish and renew local cable franchises have resulted in a flourishing and profitable industry and improved the quality of life of citizens in the United States.

Four key issues often dealt with during these local negotiations have resulted in significant broadband availability in the United States. The first is what is commonly called "build out" requirements. Cities established metrics with the local cable operator to ensure that all citizens in their communities would have access to service independent of household wealth. This is usually measured by a density formula with a set number of homes required per square mile. As a result of density requirements, as communities transitioned from urban to suburban environments, cable television and now broadband availability moved with it.

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[6] Time Warner Telecom of Oregon, LLC v. City of Portland (2004). Expert report of Alan Pearce, Ph.D. CV 04-1393-MO. Pearce also examined the presence and impact of the City of Portland's institutional network on the market. He found (contrary to claims by some providers) that the institutional network did not create a barrier to entry, and instead contributed to healthy competition and a positive economic environment.

[7] Industry data is provided by the National Cable Television Association on their website at www.ncta.com.

Secondly, cities often engaged in negotiation related to the cable television system capacity. As the infrastructure to support multiple channels was pole attached or placed underground, cities negotiated the quality of the line being laid. These negotiations often led to more robust, and frankly more expensive, lines being placed to ensure that as the entrepreneurial spirit of cable television researchers found new and exciting services to entice the American people, city systems would be well-positioned to roll them out. As a result of this negotiation, when the Internet became a consumer product in 1993, cable television was more prepared than any other wireline service in the United States to repurpose themselves from a multichannel only provider, to a multichannel and broadband provider. Using the same wire to offer two services to the American people and now 2 in 3 cable subscribers are also broadband subscribers. **Cable delivered broadband outpaces the telephone industry's state regulated DSL service or any other type of broadband service in the United States.** The Pew Internet and American Life projects most recent tracking data reports 41% of Americans use cable to access broadband, while just 33% use the state and federally regulated telephone industry's DSL service and the remaining rely on satellite and wireless broadband services.[8]

Capacity building is not an easy negotiating point for local communities. When stalemates started to occur in the mid-1990s as more and more Americans demanded upgrades to support broadband and multiple channels and balked at the rising costs of cable, the Federal Communications Commission (FCC) assisted in a voluntary federal conversation about the importance of the public interest work of cable television companies. These "social contracts" were negotiated voluntarily between cable companies and the FCC to demonstrate their commitment to upgrading their systems in a timely fashion and providing local public benefit services, such as wiring American schools at no cost to receive cable and providing at least one free high speed internet connection. Today, the cable industry reports it has provided Cable in the Classroom to more than 81,000 schools.[9]

The third asset historically negotiated by local governments is the local presence of the cable company. Most franchises include requirements related to having local offices to serve customers. This results in a locally, more responsive cable management structure that is in tune to the unique characteristics of the community they serve and is able to respond as local demographics and needs and interests change. For example, local cable companies often work with permitting offices and local construction to ensure that as new homes and neighborhoods are permitted and launched that good planning for telecommunications is included. Having decision-makers on the ground has resulted in more thoughtful and comprehensive customer service. Local presence adds to the value of cable offerings, as well as a healthy and responsive business community.

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[8] 2009, April. "Home Broadband Adoption." Pew Internet and American Life Project. Available at www.pewinternet.org/reports.

[9] Samples of social contracts are available electronically on the FCC's website www.fcc.gov.

The fourth asset of local government's relationship with cable companies in the deployment of broadband is the term of the franchise. These are typically 10 year agreements with check – points annually. This ongoing renewal process creates windows for conversations and further negotiations with the local cable provider. As new technologies are developed, the local franchise agreement is designed to respond on behalf of its community.

With local oversight the deployment of broadband is likely to be more responsive and efficient to local needs. Local planning technology teams are a key part of initiatives in Kentucky, Tennessee, Ohio and other area of the country. These local planning teams identify broadband gaps in their communities and sit at the table with local service providers, educators, business and governmental entities to set a plan of action to resolve the issue. These local efforts and established pathways are a critical ingredient to the effective deployment of broadband in our country.